

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1420

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NICHOLAS RIZZI,

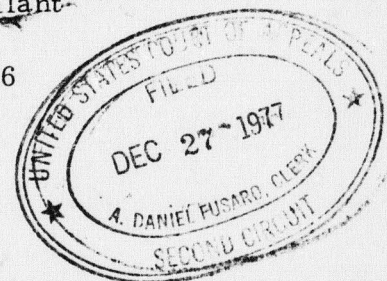
12/23

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND COMMITMENT ORDER
OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
NICHOLAS RIZZI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CURCUIT

-----X
UNITED STATES OF AMERICA, :

Appellee, :

-v- :

NICHOLAS RIZZI, :

Defendant-Appellant. :

-----X
On appeal from the United States District
Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT NICHOLAS RIZZI

ISSUE PRESENTED

Whether on the record of this case, there was sufficient evidence
to sustain the jury's verdict of guilty.

PRELIMINARY STATEMENT

This case is before this Court on an appeal from a judgment of conviction rendered upon a jury's verdict of guilty of using the mails to defraud, filing false claims against the Government, and conspiracy to do so. On October 6th, 1977, appellant was sentenced to three years, pursuant to Section 3651, Title 18, USC, with the provision that he be confined in a jail type institution for a period of six months. Execution of the remainder of the sentence was suspended, and appellant was placed on probation for three years (Hon. Gerard Goettel). Appellant is presently free on bond, pending determination of this appeal.

BACKGROUND

In a 57 count indictment, appellant, Nicholas Rizzi and Dr. Sylvan Sacolick were charged with conspiracy to violate Title 18, USC, Sections 287, 1001 and 1341 and those substantive offenses; they were also charged with forgery, but after the Government's case, the trial court granted appellant's motion to acquit him on the forgery counts.

It was the Government's contention that Sacolick and Rizzi developed a scheme to defraud the Medicaid program. Sylvan Sacolick is a physician, and through his professional corporation, Sylvan Sacolick, M.D., P.C. owned and operated a methadone maintenance treatment clinic; appellant Rizzi, directed the operations of the treatment clinic. Under the program, each patient made a daily visit to the clinic and obtained his or her methadone; Medicaid paid four dollars to Sacolick for each of these visits.

The Medicaid regulations also provided that included in the four dollar fee, was the requirement that the patients be provided with general medical care within the competence of a general practitioner at no additional cost. Additional billing was permitted only when specific care by a specialist was necessary. The indictment charges that the defendants hired other doctors to perform the basic general practice medicine, already provided for in the four dollar fee, and caused these other doctors to submit bills in their own names for the services provided to the clinic's patients, thereby double-billing Medicaid (Indictment, A 4-17).

The thrust of appellant's defense was that he merely was the administrator of the clinic and had no part in the billing procedure or the medical part of the program.

Dr. Sacolick did not stand trial with appellant, as he had absconded to Iran (915)*.

FACTS BELOW

Dr. Robert Newman, testified that from July, 1970 to December, 1974, he was an assistant commissioner in charge of addiction programs for the New York City Department of Health. He was responsible for planning and directing the City's methadone maintenance treatment program (105). He stated that there is no clear-cut distinction as to which medical conditions would fall under a general practitioner's area of competence and those which would call for a specialist (152). The decision as to whether a patient required referral to a specialist was purely a medical decision and was up to the attending physician (165).

The Government introduced into evidence Exhibit 38, a

*Unless otherwise indicated, references are to page numbers of trial transcript.

document which purported to be an employment contract between Arandia-Sacolick, M.D., P.C. and appellant. The document was supplied to the Government by Enar Management Services, Inc. and by its president, appellant, pursuant to the Government's request for discovery. The Government also introduced into evidence, as Exhibit 40, the original certificate of incorporation of Enar Management Services, Inc. (176-179).

Murial Kaplan testified that she was a bookkeeper in a firm that worked on the accounts of professional corporations "Arandia-Sacolick, M.D., P.C." and "Sylvan Sacolick, M.D., P.C." Dr. Sacolick was the sole principal of the latter corporation. All of the checks from the City of New York, Department of Social Services, Medical Account, addressed to Sacolick went into the doctor's bank account (186-188).

Robert Kemna, testified that he was an accountant, and that in the latter part of 1972, early part of 1973, he was assigned to a new account entitled Enar Management Services, Inc. He met with the corporation's principal, Nicholas Rizzi, at the Second Avenue methadone maintenance clinic, and they discussed setting up a bookkeeping system so as to prepare his tax returns. The witness identified checks made by Sylvan Sacolick, M.D., P.C. to Enar Management Services, Inc. as payment for management fees (199-203).

Afzal Hamid Sahibzada, testified that he was a physician, graduated from medical school in Pakistan, and did residency in psychiatry and internal medicine in the United States. In 1972 he applied for participation in the Medicaid program, and went to work in the Second Avenue methadone maintenance clinic in January or February, 1973. He learned of the position through an advertisement placed in a newspaper. Appellant told him that he and Dr. Sacolick

owned the clinic (207-210).

After he saw the advertisement, the witness telephoned Dr. Sacolick, and was told that a physician was required to take care of the medical needs of the clinic's patients. He then went over to the Second Avenue clinic and personally met with Dr. Sacolick. Sacolick described the type of work involved and explained the billing procedure. After seeing a patient, an appropriate billing code number was to be placed on the sheet and given to the secretarial staff at the clinic. The Medicaid billing was to be done in the name of the witness and he would retain sixty per cent; Sacolick was to receive forty per cent of the billing. The paper work would be handled by Sacolick through his Park Avenue office (211-214).

After he would see a patient, he filled out the form, and left it with secretarial staff at the clinic. Then he would get a call from Dr. Sacolick's secretary to come to Dr. Sacolick's Park Avenue office to sign the accumulated invoices. Later a Medicaid check was mailed to the witness at Sacolick's Park Avenue office. He went with Sacolick to the bank, endorsed the check and Sacolick deposited it in his own account, and then gave the witness his own check in the amount due (215-223).

Sacolick maintained two offices, the Second Avenue clinic and a Park Avenue office. Patients at the Second Avenue methadone maintenance clinic were routinely sent over to the Park Avenue office for tests (228). The witness left the Second Avenue clinic and worked one day a week at Sacolick's Park Avenue office doing the

routine testing work. Invoices to Medicaid were prepared for the work done at Park Avenue. Sacolick's partner at Park Avenue was Dr. Jose Arandia (232-238).

The witness was an internist (248). When he examined patients, appellant never told him how to diagnose a case, never told him what to write down or prescribe treatment. The more the witness billed, the more money he would make (252). The billing was done at Park Avenue; he never saw appellant there. Appellant was in charge of the Second Avenue office (257).

Khawata Ahmad Javaid, testified that he was a medical doctor, that he went to medical school in Pakistan, and did his residency in internal medicine in this country. His friend Dr. Sahibzada was working in Sacolick's Second Avenue clinic, and told the witness about a job opening there. The witness went to the Second Avenue clinic and spoke with Sacolick. He was told about the medical practice, and that he would retain sixty per cent of the billing, while Sacolick would get forty per cent. Only the witness and Sacolick were present during the conversation (260-263).

After invoices were submitted, Javaid would receive a call from the Park Avenue office informing him that the Medicaid check had arrived, and that he should come down there with his personal check to pay Sacolick's share; then he could collect his check (268). While working at the Second Avenue clinic, Javaid never saw Sacolick there after the first day of work; appellant was in charge of Second Avenue (273). Appellant never told Javaid what to do; he only told the non-medical staff what they should do (274).

When he first started working at Second Avenue, Javaid would cover for Dr. Sahibzada; he performed the services, but billed in Sahibzada's name (276-277).

When asked if he billed for a patient who merely wanted a methadone dosage adjustment, Javaid replied that he had no recollection. If someone asked for a dosage adjustment and also complained of a headache, he would examine the patient and write down "headache or insomnia". He billed every patient he examined as an internist, no matter how trivial the problem. He did this on his own; when he examined a patient, he did so in his capacity as an internist (280-282).

At the time Javaid worked at Second Avenue, he was not familiar with the Medicaid regulations with respect to the obligations of a methadone clinic to provide general medical care to its clients. He first learned about that just before he testified before the Grand Jury (287).

Mircea Zane, testified that he was a physician, his specialty being pathology (288). In the fall of 1973, Sacolick contacted Zane and asked him to examine his female patients. Zane would have to pay forty per cent of the Medicaid billing to Sacolick (289-291).

After he filled out a form after he examined a patient, the invoices were prepared by administrative people working for Sacolick. Then the invoices would be submitted to Zane for signature; the person who usually gave him the invoices to sign was "mostly Mr. Rizzi" (295). Zane paid to Sacolick his forty per cent in advance of receiving the Medicaid check. Based on the invoices Sacolick computed how much Zane owed him, and Rizzi would tell Zane how much Sacolick said was owed. The Medicaid check was mailed to Zane's home address and he would keep the whole check (296-299).

Zane had met Sacolick many years earlier in Mount Sinai Hospital when he was a heart patient of Sacolick (315). When he was working the Second Avenue clinic, it was difficult to communicate with Sacolick by phone; he mainly communicated with him through Rizzi. Zane would ask appellant questions and then appellant would come back with Sacolick's answers. He would describe that appellant did what Sacolick wanted (323). Rizzi never told Zane what he should do in the medical practice (315).

Rizzi had told Zane that a long time ago he had used drugs (325).

George Kamen, testified that he was a physician (330). In March, 1973, he responded to an advertisement in The New York Times, and phoned Sacolick. He went to the clinic and met Sacolick and observed how a Pakistani doctor was conducting the practice. Sacolick introduced Kamen to appellant, saying he was the administrator of the clinic (333-338). Later he decided that he wanted the job, and met with Sacolick at the Park Avenue office. The salary was \$40,000 for full time work plus a substantial incentive increment on volume. He would receive \$4 per patient beyond 125 patients (340-343).

After he would see a patient, he would write up his diagnosis on a sheet, place a code number on it, and bring it to the front office (347). Later, he was given blank invoices to sign. Rizzi, usually was the one who brought him a batch of blank invoices to sign. He would sign the blank invoices in his spare time and then give them to appellant (351-354). Usually Rizzi would bring the Medicaid checks to Kamen for signature. At first they were brought in face up. When Kamen saw the figure, he said "Wow", and then the checks were usually

brought to him for endorsement face down. Rizzi told him not to look at the check, so it would not bother him (360).

On cross-examination, Kamen described how he worked all day, usually without even taking a lunch break. He loved his work, and at the beginning he would see about fifty patients a day (388-389). He was not interested in the incentive pay, and was satisfied to work for the \$600.00 a week salary. He kept a list of the amounts of sheets he stacked up to satisfy his curiosity as to how many patients he saw each day, not as a check on his incentive pay. In the beginning, he had no idea that his pay was even connected to the amount of sheets he piled up, he was so naive (407-412).

On re-direct examination, the witness related that on one or two occasions, appellant told him that he was taking too much time with patients, and that he should hurry it up (456). He later acknowledged that patients would be waiting to see the doctor, maybe ten, twelve people. He didn't know if as many as twenty people were waiting, what time they came in, or how long they had been waiting. He didn't remember if Rizzi told him to hurry up in the context of accommodating people waiting a long time to see a doctor (468-469).

In response to a juror's inquiry as to the nature of Kamen's illness in 1974, while he was working at the clinic, the court questioned the witness. Kamen stated that he had a rare form of hyperthyroidism. A juror guessed at Kamen's age being in the eighties; the witness stated that he was sixty-two. The witness stated that his illness did affect his recollection of events, events of three and four years earlier (460-467).

Manuel Rodriguez, testified that from 1972 until 1975 he worked for Drs. Arandia and Sacolick; he started doing office work .

At the end of 1971 or beginning of 1972, Dr. Sacolick opened a private methadone maintenance treatment program at Park Avenue (470-473). Then in the middle of 1972 to the beginning of 1973, Sacolick opened the Second Avenue clinic (474). Rodriguez remained at Park Avenue, but was responsible for the Second Avenue billings. He also signed Dr. Arandia's name on the invoices for the routine examinations of the Second Avenue patients; the exams were done by Sacolick, but billed in the name of Arandia (480-485).

Rodriguez worked with Sacolick for some time, and he got to know him. In addition to being a doctor, Sacolick was also an engineer; he even set up his own computer program in the office, and attended classes at Hunter College in advance computer work. Sacolick had an apartment near school, another one for his wife, and a third apartment for his mistress, who was also his patient (501-503).

Sacolick spent designated days of the week at each of the three apartments. His Park Avenue office was also structured so as to conduct different activities at designated times, i.e. internal medicine, cardiology and geriatrics; routine examinations of Second Avenue patients; a private methadone maintenance program; and a sex therapy clinic (504-506).

Rodriguez first met appellant when Rizzi was a patient in Sacolick's drug program. He remembered Rizzi reporting to Sacolick the progress in the growth of the Second Avenue clinic (507-508).

In connection with the billing, there were firm submission dates; delayed submission could mean waiting a full month for payment, and \$50,000.00 could be tied up for that period. The doctors who worked

at Second Avenue had their own designated submission dates. Dr. Kamen gave them the most amount of paper work, so Dr. Sacolick gave him the idea to have Kamen pre-sign the invoices in order to be able to meet Kamen's submission date. There were times that he would phone Rizzi and tell him to send up more of the signed invoices (512-514).

Sacolick usually wanted to examine thirty people a day in regard to the routine examinations. Not all who were scheduled came, so they would schedule ten or twelve people more. If there weren't enough people for the examinations, Rodriguez would call up Second Avenue and tell Rizzi to send over additional people (515-516).

Richard Anthony Yurasits, testified that in 1971 he joined Sacolick's methadone maintenance program at Park Avenue; it was private and he paid for it. In February 1972, Sacolick opened a second program at Second Avenue. Rizzi was named administrator of that program (533-536). Appellant was his immediate boss at the clinic (540).

In October of 1972, Medicaid started to reimburse the Second Avenue methadone maintenance program for its patients, and the amount of people in the program increased (540-542).

In 1974, Rizzi told Yurasits that he was getting 15% of the gross Medicaid billings and that he was an owner of the clinic (556-558). Government's Exhibit 39 A and 39 B was stipulated to be in the handwritings of Sacolick and Rizzi (560-561).

Yurasits testified that in the fall of 1972, when Medicaid announced that it would reimburse for methadone maintenance treatment, he saw a copy of the Medicaid regulations on Rizzi's desk; he didn't read it, but just browsed through it (586).

He recalled overhearing a conversation between Sacolick and Rizzi in

1974, whereby they discussed Medicaid's withholding 75% of the billing; previously Medicaid pre-paid 95% of the billing, and now they were hurting financially (596, 599-600).

In 1972, he participated in the building of the Second Avenue clinic with Rizzi, and they sent out circulars to attract new people into the program (624-625).

The witness spoke with the assistant U.S. Attorney on about ten separate occasions (628). He restated that he had seen Medicaid's regulations, dated September 11, 1972, on Rizzi's desk. He didn't read the whole thing, but remembered the front page. In 1972, other governmental agencies were sending a lot of stuff, regulations and criteria to the Second Avenue clinic, lots of paper crossed the desk (629-631).

Kenneth Bitz, testified that he presently and in 1972 through 1974 was an administrator of a methadone clinic (645). In late 1974, early 1975 the private methadone programs in the city formed an association to try and obtain increased payments from Medicaid; they felt that the \$4 per patient was insufficient. A city official set up a series of seminars for the administrators of the private methadone programs. The series consisted of six seminars, and between fifteen and twenty people attended. Rizzi attended some of the seminars (649-651).

The industry-wide association that was concerned with increasing the fees was the Independent Physicians Drug Abuse Council. Bitz' program was a member, and he attended the meetings representing his program. He never saw Rizzi at those meetings, but Sacolick was there a good number of times (652-653).

Steven Rosenberg, testified that he was a physician, and from 1970 through mid-1973 he was deputy executive medical director of the Medicaid

program for the New York City Health Department (679-680).

The witness acknowledged that Medicaid allowed a specialist to bill for his services beyond the \$4 per visit, when care by a specialist was necessary. It is a medical decision whether a specialist is required. In reviewing various medical records, Dr. Rosenberg came across some of the following diagnoses: bradycardia for slow heartbeat; diaphoresis for sweating.

The various diagnoses were written up by the examining doctors (707-709). Some other diagnoses were avitaminosis for lack of vitamins, poor nutrition and furunculosis for bigger pimples than acne (703-704).

At the conclusion of the Government's case, appellant moved for a judgment of acquittal. One ground was that when a person is charged with aiding and abetting, there must first be a conviction of the principal in question. The application was denied (743-746) (A 18-21). The court dismissed counts 53 through 57 of the indictment, forgery counts, and counts 32, 39, 45, and 52, which pertain to Sacolick's billing his examinations in the name of Arandia (758).

ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE GUILTY VERDICT.

This conviction rests upon the jury's application of 18 U.S.C., Section 2, that whoever aids or abets another in the commission of a crime is punishable as a principal. The ultimate issue in this case is really whether appellant was an unknowing person who was used and exploited by the principal, Dr. Sacolick, or, whether he knowingly participated in the Medicaid scheme. This crucial distinction was aptly re-stated by this Court in United States v. Licursi, 525 F. 2d 1164, 1167 (1975):

"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' "

In United States v. Baumgarten, 517 F. 2d 1020, 1027 (8th Cir., 1975), it was held that in order to establish aiding and abetting the government must show that the defendant had a "purposeful attitude", and in some manner participated in the wrongful deed, that there be "some affirmative participation which at least encourages the perpetrator."

In reviewing the evidence at bar, it will be observed that appellant's guilt is based primarily on his mere association with Sacolick, and that there is no substantial evidence that he was a knowing participant in any scheme to defraud, cf. United States v. Tutino, 269 F. 3d 488 (2nd Cir., 1959).

While even the Government concedes that Sacolick was the driving force behind the Medicaid scheme described at the trial, the plain evidence does not support the Government's claim that Rizzi was party to the scheme. The crux of the Government's case against appellant, is essentially that he knew that the four dollar fee underwritten by Medicaid, also included primary medical care, and that the doctors who worked at the Second Avenue clinic, were not permitted to charge additionally if a general practitioner could attend to the patient.

Several pieces of evidence were submitted by the Government with the purpose of demonstrating appellant's knowledge on this matter. Yurasits testified that five years earlier, in 1972, he remembered seeing the Medicaid regulations on appellant's desk. Putting aside the question as to the accuracy of Yurasits' observation, there is still no evidence that appellant ever read any part of the regulations, and specifically that part which dealt with primary medical care; even if he did read it, it is questionable as to whether he would understand it. The trial evidence was clear that the decision whether a matter fell within the competence of a general practitioner was a medical decision.

Similarly, evidence that seminars were conducted concerning different aspects of running methadone maintenance clinics, and that Medicaid reimbursement was discussed there, does little to prove knowledge on the part of appellant as to the proper scope of medical billing under the Medicaid program. The primary evidence which demonstrates appellant's true position in relationship to Sacolick is the testimony of Kenneth Bitz, as to how Sacolick and not Rizzi, attended the meetings, and was a member of the Independent Physicians Abuse Council. It is clear that this was the group which was knowledgeable about the Medicaid reimbursement program and which had a stake in it.

Even though appellant was the administrator of the Second Avenue clinic and was in charge of its day to day operation, it was Sacolick, alone, who hired the doctors and who made the financial arrangements with them. Rizzi never gave instructions to the doctors, or interfered with the medical practice. It was the doctors who diagnosed the cases, and who ascribed the exotic names to commonplace conditions; it was the doctors who obtained a direct financial gain from the double billing.

Simple, easily explainable incidents were presented and given sinister twists. For example, Dr. Kamen testified that appellant would on a couple of occasions urge him to work faster. He also testified however, that many patients who had waited a long time to see him were sitting outside of the office. Rizzi's urging him to move on manifestly demonstrates consideration for patients and not venality.

This same Dr. Kamen also testified how he was given blank invoices to sign. Rodriguez explained how Sacolick went along with the idea of having Kamen sign blank invoices in order to expedite the paper work and enable Rodriguez to meet the requisite submission date. It appears that Kamen, and the other doctors too, were submitting invoices as a matter of course for each patient they saw. This seems to have been the regular course of business. This was the way the operation worked pursuant to arrangements between Sacolick and the various doctors. And generally, it is the function of an administrator to see that the established system works, and to make it work as smoothly as possible. If the people in charge of billing at Park Avenue thought it necessary to expedite the paper work by having Kamen sign blank invoices, appellant would hand him the invoices. As a matter of fact, there is no allegation of fictitious billing, and apparently this

device of signing blank invoices was actually employed as stated by Rodriguez - to expedite the paper work.

The methadone maintenance clinic was established by Sacolick. In fact, appellant was originally a patient at the Park Avenue office. The very fact that Sacolick would enter into any sort of business relationship with Rizzi bespeaks the respective roles of the participants in the venture. The doctor would use the patient, the former drug addict, to do what he could do best - to bring more addicts into the program, and have daily contact with them once they were enrolled in the program. The doctor would continue to do what he already had been doing, and to expand upon it, - to set up the operation of the methadone maintenance program and to be in charge of the hiring of the medical personnel. He even got involved in the billing, by building his own computer program.

In both the Government's opening and closing statements, it was stated that the scheme to defraud could not have been carried out without appellant's participation. In a sense this is true, as Sacolick did require addicts to be enrolled in the program and for someone to manage the day to day operation of the Second Avenue clinic. To be sure, if he didn't have Rizzi, Sacolick would have to find someone else. But the fact that Rizzi was needed to operate the scheme is not the same as his willing participation in it. Of all the evidence relied on by the Government, only one incident portrays appellant in an active role, that is his forming of Enar Management Services, Inc. But it is patently obvious, that the formation of the corporation was for the purpose of minimizing his taxes, and in no way could be considered as participation in any Medicaid scheme.

Rizzi did make money out of his efforts at the Second Avenue clinic. While the evidence is not absolutely clear, Government exhibits 38 and 39 do tend to show that appellant was paid a percentage of the methadone billing, which necessarily is based on the volume of persons in the program.

In addition to forming his management corporation, appellant readily acknowledged to others that he had an interest in the clinic and that he was more than a salaried employee. His entire conduct in connection with the clinic sounds more like that of a proud, enthusiastic young man than of a knowing, wilful participant in a Medicaid scheme.

CONCLUSION

The judgment below should be vacated and the indictment as to appellant dismissed.

December 22, 1977

Respectfully submitted,

Gerald Zuckerman
Attorney for Defendant-Appellant

Receive! 2 copies of brief.
Dec 23, 1977

